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**IN THE SUPREME COURT OF THE STATE OF ARIZONA**

In the Matter of:

) No. R-13-0004

)

) **COMMENT OF ARIZONA**

Petition to Amend Rule 15.8, Arizona

) **ATTORNEYS FOR CRIMINAL**

Rules of Criminal Procedure

) **JUSTICE REGARDING PETITION**

) **TO AMEND RULE 15.8, ARIZONA**

) **RULES OF CRIMINAL**

) **PROCEDURE**

)

)

¶1 Pursuant to Rule 28 of the Arizona Rules of Supreme Court, Arizona Attorneys for Criminal Justice (“AACJ”) hereby submits the following comment to the above-referenced petition. AACJ is a not-for-profit membership organization representing four hundred criminal defense lawyers licensed to practice in the State of Arizona, as well as law students and other associated professionals, who are dedicated to protecting the rights of the accused in the courts and in the legislature.

¶2 AACJ supports the Petition and proposed rule change as providing necessary guidance to all practitioners by amending Rule 15.8 to a common-sense

understanding that supports the underlying intent of the rule. Arizona has established early and consistent disclosure requirements under Rule 15.1. The proposed amendment to Rule 15.8 insures that the purpose of the disclosure rules can be judicially enforced when the state fails to timely provide the defendant material disclosure, irrespective of whether the prosecutor sets a plea deadline. *See e.g., State v. Rivera-Longoria v. Slayton*, 228 Ariz. 156, ¶ 10 (2011) (analyzing whether Rule 15.8’s language, “[i]f the prosecution has imposed a plea deadline,” is met when the prosecutor withdraws the plea without having established a deadline for its acceptance).

¶3           Since 95% of criminal cases nationally are resolved through the plea-bargaining process, *see Missouri v. Frye*, \_\_\_ U.S. \_\_\_, 132 S.Ct. 1399, 1407 (2012), *citing Padilla v. Kentucky*, 559 U.S. \_\_\_, 130 S.Ct. 1473, 1485-86 (2010) (plea bargaining “*is*” the criminal justice system),<sup>1</sup> enforced transparency in the information underlying the State’s case is crucial to protect actual and perceived fairness, more just and accurate outcomes, and defense counsel’s ethical responsibilities towards his client. *See also Rivera-Longoria*, 228 Ariz. 156, ¶ 6, citing Rule 15.1’s 2003 Comment (amendments were intended, *inter alia*, to “recognize ‘the defense attorney’s need for basic information early in the process

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<sup>1</sup> Citing Scott & Stuntz, *Plea Bargaining as Contract*, 101 Yale L. J. 1909, 1912 (1992) [and] Barkow, *Separation of Powers and the Criminal Law*, 58 Stan. L.Rev. 989, 1034 (2006).

in order to meaningfully confer with the client and make appropriate strategic decisions.””).

¶4 Whether there is a plea “deadline” (for the defendant to accept the plea offer) or a plea “withdrawal” (by the state before the plea is accepted),<sup>2</sup> the equal application of an exclusionary-type rule across all pleas that are offered – irrespective of whether the prosecutor has set an arbitrary deadline – will motivate compliance with disclosure rules and may be the only effective means to remove incentives to withhold disclosure. Thus, the proposed change offers a common-sense clarification that will permit equal treatment of defendants throughout Arizona whether or not an individual prosecutor sets a plea-acceptance deadline in any given case.

¶5 Moreover, the rule’s clarification will support defense counsel’s ethical duties as set forth in *Frye* and in *State v. Donald*, 198 Ariz. 406, 10 P.3d 1193 (App. 2000). The decision to accept or reject a plea offer, with effective assistance of counsel, requires counsel to provide the client informed advice that includes “not only the terms of a plea bargain offer, but also the relative merits of the offer compared to the defendant’s chances at trial.” *Donald*, 198 Ariz. 406, ¶ 9, *citing Commonwealth v. Napper*, 254 Pa.Super. 54, 385 A.2d 521, 524 (1978) (citing in turn the A.B.A. Project on Standards for Criminal Justice: Standards

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<sup>2</sup> See *Rivera-Longoria*, 228 Ariz. 156, ¶ 20 (recognizing the difference between a deadline and a withdrawal).

Relating to the Prosecution Function and the Defense Function (Approved Draft, 1971)). The less the lawyer knows about the state's case due to lack of disclosure, the less accurate and informed the lawyer's advice will necessarily be. Accordingly, the proposed change will eliminate the gap in Rule 15.8's application that this Court left open in *Rivera-Longoria* because Rule 15.8 sanctions, which now apply only when the prosecutor sets an arbitrary "deadline," would be extended to all cases where material disclosure arrives after nonacceptance of a plea offer regardless of the circumstance by which the plea offer was withdrawn. The rule change petition supports the intent behind early disclosure and the state's continuing duty to provide material disclosure. If the rule change is not granted, it opens the door for the unequal application of a critical prosecutorial duty and the unequal treatment of similarly-situated defendants.

¶6 For these reasons, AACJ respectfully requests this Court grant the petition to amend Rule 15.8.

DATED: May 21, 2013.

ARIZONA ATTORNEYS FOR CRIMINAL JUSTICE

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